UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Rayne Hymn,

Charging Party, and

Rayne Hymn,

Intervenor,

v.

Courthouse Square Company, Urban, Inc.,
Preston DeJongh and Joan DeJongh,

Respondents.

HUDALJ 08-95-0321-8
Decided: August 13, 2001

Michal F. Stover, Esq.
For the Charging Party

Rayne Hymn, *Pro Se*

Alfred S. Blum, Esq.
For Courthouse Square Company, and
Urban, Inc.

Kenneth Hope, Esq.
For Joan DeJongh

INITIAL DECISION

This matter arose as a result of a complaint filed by Rayne Hymn ("Intervenor" or "Complainant") alleging discrimination in violation of the Fair Housing Act ("the Act"),

as amended, (42 U.S. C. § 3601-3619). Following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a Charge of Discrimination against Courthouse Square Company, Urban, Inc., Preston DeJongh[1] and Joan DeJongh ("Respondents") alleging that they had engaged in discriminatory housing practices in violation of 42 U.S.C. § 3604 (f)(1)(A), 3604(f)(2)(A), 3604(f)(3)(B) and 3617. The Charge, at part C, includes the following contentions:

> (1) By applying different standards regarding pets and disturbances to Complainant because of her handicap, Respondent directly or indirectly discriminated against Complainant in the terms, conditions and privileges of rental of her dwelling in violation of 42 U. S. C. § 3604(f)(2)(A) and 24 C.F.R. § 100.202(b);
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> (2) By terminating Complainant's tenancy because of her handicap, Respondents directly or indirectly discriminated against Complainant in the rental of a dwelling in violation of 42 U. S. C. 3604(f)(1)(A) and 24 C.F.R. § 100.202(a);
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> (3) By terminating Complainant's tenancy for creating disturbances, Respondents directly or indirectly refused to reasonably accommodate Complainant's mental handicap and thereby discriminated against Complainant in violation of 42 U. S. C. § 3604(f)(3)(B) and 24 C.F.R.. § 100.204(a); and
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> (4) By terminating Complainant's tenancy because she assisted a fellow mentally handicapped tenant in discussing with Respondents a matter of concern regarding the other tenant's tenancy, Respondents directly or indirectly interfered with Complainant on account of her having aided another person in the exercise of rights granted by the Fair Housing Act in violation of 42 U. S. C. § 3617 and 24 C.F.R. § 100.40.

On November 30, 2000, the undersigned granted the Complainant's request for intervention. A hearing was held February 6-8, 2001, in Denver, Colorado, where Intervenor appeared *pro se.*

At the beginning of the hearing on February 6, 2001, Respondents moved to dismiss the Charge of Discrimination ("Charge"). Respondents' motion to dismiss was

[1]On February 6, 2001, the undersigned granted Respondent Preston DeJongh's motion to dismiss the charges against him. Thus, the term "Respondents" used herein refers only to Courthouse Square Company, Urban, Inc. and Joan DeJongh.

grounded on HUD's failure to complete its investigation and issue its reasonable cause determination within 100 days of the filing of Ms. Hymn's complaint as required by 42 U.S.C. § 3610 and 24 C.F.R. § 103.225, and on their claim that HUD failed to adequately and fairly attempt to conciliate the complaint in violation of 24 C.F.R. § 103.300. Based on Respondents' proffer, the undersigned found insufficient evidence of substantial prejudice to require dismissal, but reserved final ruling on the motion until after the taking of all the testimony. At the conclusion of the trial, I required the filing of a post-trial memoranda in support of, and in opposition to, the motion. These were submitted. After consideration of the Motion and supporting arguments and evidence, I entered an order denying the motion.

Post-trial, Respondents also filed a Motion for Directed Verdict as to the section 3617 (42 U.S.C. § 3617) charge. I reserved ruling on the motion until I issued this decision.

After consideration of the testimony and the documentary evidence in the case, as well as the arguments of all parties, it is the decision of the undersigned that the Charging Party and the Intervenor have failed to meet their burden, as to all charges, to prove handicap discrimination by a preponderance of the evidence. Accordingly, I find for the Respondents on all counts in the Charge of Discrimination.

STATEMENT OF FACTS

1. Courthouse Square Apartments ("Courthouse Square Apts.") is a 157-unit apartment complex located at 901 W. 14th Avenue, Denver, Colorado. Stip. 1.[2] It is a HUD-assisted project for the elderly and the handicapped. Approximately 30% of the tenants are non-elderly handicapped persons. Stip. 4; Tr. 338.

2. From at least 1982 through the present, Respondent Courthouse Square Company ("Courthouse Square Co."), a Colorado limited partnership, has owned Courthouse Square Apts. Tr. 399; Cx-68.

3. During all relevant times, Respondent Urban, Inc. has been the management agent at Courthouse Square Apts. for Respondent Courthouse Square Co. Cx-68.

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[2]The abbreviations used are as follows: "Stip." for stipulated facts; "Tr." for hearing transcript; "Cx-#" for Charging Party exhibits; "Rx-#" for Respondents' exhibits, and "Depos. Tr." for deposition transcript.

4. Respondent Joan DeJongh has been employed by Respondent Urban, Inc. since November, 1991. Initially, Joan DeJongh was the Assistant Manager at Courthouse Square Apts. She served in that capacity until sometime between July 13, 1993, and August 18, 1993, when she became one of two resident managers there, responsible for performing office functions. She has held that position since that time. Stip. 9.

5. Preston DeJongh was employed at Courthouse Square Apts. by Respondent Urban, Inc., from November, 1991 through March 19, 1998, as co-resident manager with Joan DeJongh. He was responsible for keeping the grounds and maintenance. Mr. DeJongh is the spouse of Respondent Joan DeJongh. Stip. 10; Tr. 211-212.

6. From at least September 1, 1991, through at least July 12, 1993, John Melarane was employed by Respondent Urban, Inc., as the resident manager at Courthouse Square Apts. Stip. 8.

7. From at least January 1994 through September 6, 1994, Ed Marzano worked as a night security guard at Courthouse Square Apts. Tr. 216, 320. Mr. Marzano would regularly record his observations of tenants on "sticky notes." He was a "pretty thorough note taker" and tended to write up everything he saw that was wrong. He took notes every night he was on duty and then would leave the notes for Joan DeJongh who would then place the notes in the respective tenant's file. DeJongh's Depos. Tr. 58-60 and 63-64; Rx-19 - Rx-27.

8. From at least January 1, 1991, through at least September 17, 1997, Melanie Urquijo Murphy ("Mrs. Murphy")[3] was employed by Respondent Urban, Inc., as a property manager with responsibility for Courthouse Square Apts. and other properties. In that capacity, she supervised the employees at Courthouse Square Apts. Stip. 7; Tr. 487.

9. Rayne Hymn was born on August 29, 1947. She was formerly known as Carolyn Tracy, but had her name officially changed to Rayne Hymn in 1991. She lived in Denver, Colorado from 1987 continuously until 1996. Tr. 155; Cx-48 and Cx-51.

10. In early 1985, Rayne Hymn (then known as Carolyn Tracy) was professionally

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[3]Mrs. Murphy is sometimes identified in the written documents and testimony as Melanie Urquijo or Melanie Murphy.

diagnosed as suffering from depression and in or about 1990 was declared disabled for

purposes of Supplemental Security Income ("SSI").[4] Since approximately 1990 or 1991 she has received Social Security Disability Income. Tr. 67-78.

11. On July 1, 1992, Intervenor completed an application to rent an apartment at Courthouse Square Apts. On her rental application she stated that she was disabled. Stip. 15-16, Cx-48. Social Security Administration forms provided to Respondent Urban, Inc., in connection with Intervenor's initial rental application reflected that Intervenor was disabled and received Social Security Disability Income. Stip. 17, Cx-49.

12. In order to be eligible for residency at Courthouse Square Apts., a person had to be disabled/handicapped or elderly.[5] On June 1, 1993, John Melarane certified that Ms. Hymn was eligible for residency at the apartment complex based on her handicapped status. Stip. 8, 19, Cx-48.

13. A person who was determined to be disabled by the Social Security Administration met Courthouse Square Co.'s eligibility requirement for residency based on disability/handicap. Tr. 221.

14. On June 1, 1993, Intervenor entered into a lease for, and began occupying, apartment #408 at Courthouse Square Apts. *See* Answers of Courthouse Square Co. and DeJongh.[6] She continued to live at Courthouse Square Apts. through September 9, 1994. Rx-16.

15. At all relevant times, Respondents' lease for Courthouse Square Apts. contained the following provisions:

> 13. . . .The tenant agrees not to: . . . D. have pets or animals of any kind in the unit without the prior written permission of the Landlord, or E. make or permit noises or acts that will

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[4]SSI is a federal program that provides financial assistance to disabled people with low incomes.

[5]To qualify as an elderly resident, a person had to be 62 years of age. Tr. 221. On June 1, 1993, Ms. Hymn was 45 years of age.

[6]Respondents Courthouse Square Company and Urban, Inc., submitted one combined Answer and Respondent Joan DeJongh submitted a separate Answer, which will be referred to as "Courthouse Square Co. Answer," and "DeJongh Answer," respectively.

disturb the rights or comfort of neighbors. [Cx-6.]

16. Courthouse Square Apts. had a policy strictly prohibiting pets unless an addendum to the lease was signed by the tenant and by the Resident Manager. Even with an addendum, only one pet was allowed in each apartment (the term "pet" did not include birds and

aquarium fish). The pet could weigh no more than 25 lbs. A deposit of $300 was required when the pet moved in, or an initial deposit of $50 had to be paid when the Pet Addendum was added to the lease, with the balance to be collected in installments of $10 per month until paid in full. The policy also required that the pet be immunized. Cx-1, p.4.

17. Respondents did not enforce their pet rules in that they permitted tenants to keep pets in their apartments without executing a Pet Addendum, and permitted at least one tenant other than Intervenor to keep multiple pets. Tr. 372-84.

18. During her tenancy at Courthouse Square Apts. Respondents never gave Ms. Hymn a copy of their written pet rules. Tr. 150-151; 207-210.

19. Ms. Hymn was allowed to move into Courthouse Square Apts. with a dog named "Mindy," a cat named "Baby," a bird and some fish. At that time, she had owned the dog and cat for approximately six or seven years. Her dog "Mindy" weighed 35 lbs. She was not required to sign an addendum to the lease; however, she was required to pay a $300 pet deposit, which she was permitted to pay in installments of $20 per month. She paid the $20 per month regularly during her tenancy. Tr. 84-85; 159.

20. Sometime in March 1994, Intervenor took in her son's dog, "Pepper." Tr. 89.

21. Ms. Hymn lived at Courthouse Square Apts. from June 1, 1993 to September 9, 1994. During her 15-month tenancy there, Ms. Hymn had a number of conflicts with other tenants and with management staff. These are described in the evidence as:

> At some time early in Ms. Hymn's residency at Courthouse Square Apts., she wrote a note to her next-door neighbor, which she left on the neighbor's door. The note said:
>
> > "Hi, I am your "<u>next door neighbor</u>." I plan on being here for the <u>rest of my life</u>! So you better get used to it! Rayne! <u>#408</u>! (Emphasis in original) Tr. 186, Rx-28a.
>
> On January 8, 1994, at about 4:00 a.m., the newspaper deliveryman knocked on

the DeJonghs' door and reported a drunk woman on the fourth floor following him around. Rx-26. Respondent Joan DeJongh did not know who the woman was, but another tenant described the woman, and Mrs. DeJongh concluded that it was Ms. Hymn. Tr. 324-325. Mrs. DeJongh put a note in Ms. Hymn's tenant file to that effect. Rx-26.

On that same date, complaints were received from two other tenants in apartments on the fourth floor that Intervenor kept knocking on their doors all the time. They reportedly were afraid of her, so they let her knock and didn't answer the door. They knew she had a temper. Rx-26. Also, on that date, police came to the complex to investigate harassing telephones calls that had been traced to Ms. Hymn's apartment. *Id.*

On February 6, 1994, at 4 a.m., Ms. Hymn knocked on the DeJongh's door on the first floor of her building. When Preson DeJongh answered, she reported that a man had been running up and down the fourth floor hallway and screaming. Preston accompanied her back to the fourth floor and saw nothing. Rx-6. Ms. Hymn claims that Preston DeJongh accused her of having bad company and threatened to call the police if she did not go back to her apartment.

Still upset from her encounter on February 6, 1994, with Preston, Ms. Hymn on February 9, 1994, put a letter under Preston DeJongh's door criticizing statements he made to her on February 6.th. Tr. 184, Rx-28. In her note she said:

> Dear Preston,
> Do you know what is wrong with you? You are afraid of like – afraid of other human beings - even afraid of yourself. So you try to play "Boss" man just to try to scare and intimidate others. Well, I'm afraid that these tactics are not going to work with me. I have not committed any crimes. I am not a criminal. I only want to report some suspicious activities in the hall of the 4th floor! My visitors have absolutely nothing to do with this - and you know it! In fact, my visitors are none of your business, unless they are causing someone else problems!
> I am tired of living under "this veil" of deceit! You are endangering everyone's life with your attitude! - and now, you want to talk about "my visitors" - I'm sorry, but this is Bullshit - and I am going to go to the top with this, if necessary!
>
> Rayne 408!

Ms. Hymn wrote to another tenant:

> I don't know why you think "your apology" should be something SO WORTHY of my acceptance! I really don't give a damn if you apologize or not! I didn't ask for
> your IGNORANT ASS OPINIONS, and I damn sure am not asking for an apology!
>
> I've seen you downstairs many times in the past year. As far as I am concerned, You are nothing more than another one of THAT GROUP of LOBBY BUMS who have nothing else to do all day, except congregate and patrol the hallways and

> entrances to this building, only to gossip and spread vicious rumors and monitor everyone else's life, except **your own**!
>
> If you have a complaint against me, GO TO THE MANAGEMENT WITH IT!
>
> I am not hurting you, and I wish you would LEAVE ME ALONE!
>
> The questions you asked about me were really NONE OF YOUR BUSINESS! If you bother me again, I am calling the police on a "harassment charge"!
>
> Why don't you GET A LIFE!...INSTEAD OF ALWAYS NOSING AROUND IN OTHER PEOPLE'S BUSINESS! (emphasis in original). [Rx-29]

On March 28, 1994, 11:45 p.m., the resident in apartment 306 called the police to check Ms. Hymn's apartment for a possible fight. Her boyfriend left before police arrived. Ms. Hymn told police everything was ok and that there was no fight. Tr. 323, Rx-24.

On March 29, 1994, Ethel McCoy, a tenant, complained to Joan DeJongh that Ms. Hymn had been knocking on her door the night before, and accused Ms. McCoy of having said things about her. When Ms. McCoy did not respond, Ms. Hymn returned to her apartment and starting banging something against her ceiling for nearly an hour, generating lots of complaints. Tr. 318, Rx-21.

On April 8, 1994, 9:30 p.m., Mr. Marzano, the night security guard, wrote a note to the effect that Ms. Hymn had called the police to remove her boyfriend from her apartment, but the boyfriend had left before the police arrived. Police told him to call if the boyfriend came back. The boyfriend returned at about 10:00 p.m.

Mr. Marzano called police and told them he would sign a complaint, but the boyfriend had left the building by the time police arrived. Tr. 321-322, Rx-23.

On April 9, 1994, 11:30 p.m., Intervenor put a letter under Mr. Marzano's door criticizing his actions regarding the fire door. Ms. Hymn would take her dog on daily walks, leaving by way of the back stairs and exiting the building via the fire door. One day in April she found the fire door locked. According to her, Mr. Marzano had locked the fire door from the inside. She was very disturbed by his actions and wrote him a note to tell him so. Tr. 183, 199, Rx-22. She wrote:

> I know that you have complained about homeless people getting into our building. Many of us share that same concern, yet you do nothing to protect our security! Why is that Eddie? Do you think it is ok to lock A FIRE EXIT FROM the inside to keep

> people out? Do you want all of us to Burn Alive in this building? I have witnesses who have heard you BRAG about your Locked Door! (And seen it locked for two days!) You do not answer any of my calls for help - for "security" at the Front Door? (At the date of this letter.) Why is that Eddie? I have witnesses to support my allegations on this point too. I have a copy of this letter, and I will take it to court with me. (Emphasis in original).

22. Ms. Hymn requested a meeting with the Property Manager to talk about the locked fire door and about her feeling that she was being harassed by other tenants and by Preston DeJongh. Pursuant to her request, Mrs. Murphy met with her on April 13, 1994, in Ms. Hymn's apartment. Ms. Hymn had never spoken to Mrs. Murphy before this meeting.

23. During the meeting with Ms. Murphy at her apartment, Ms. Hymn complained about Preston DeJongh's conduct toward her (allegedly making false claims about her boyfriend and threatening to call the police on her), and about Marzano's locking of the fire door.

24. While at the apartment, Mrs. Murphy observed that Ms. Hymn had two dogs, a cat, a bird and a fish. Mrs. Murphy told Ms. Hymn that the pet rules permitted her to have only one pet and that Intervenor was in violation of her lease by having so many. She told Ms. Hymn that even the birds and fish were considered pets. Ms. Hymn explained to Mrs. Murphy that she had never been informed of the Courthouse Square's pet rules, and that former resident manager Melarane had permitted her to move in with, and to keep, her dog and cat. She stated further that one of the two dogs there - "Pepper" - was her son's dog, and that his stay was temporary while her son moved from one apartment to another. Mrs. Murphy told Ms. Hymn she would check with Mr. Melarane and get back to Ms.

Hymn as to her two pets, but Ms. Hymn would have to get rid of her son's dog.[7] Mrs. Murphy expressed no particular concern about the bird and the fish. Ms. Hymn told Mrs. Murphy she did not know if she could find a place for "Pepper" immediately, but that she would do so as soon as possible.[8] Courthouse Square Co. Answer ¶26, Tr. 91, 493, 495, 529-530.

25. Mrs. Murphy never got back to Ms. Hymn to follow-up on the conversation of April 14, 2001. Since Mrs. Murphy didn't get back to her, Ms. Hymn thought that the pets issue was not a serious one. Tr. 129.

26. On June 1, 1994, Ms. Hymn was recertified for housing at Courthouse Square Apts. Ms. Hymn's lease was continued in effect without conditions.[9] Cx-34.

27. On June 18, 1994, Mr. Marzano reported by note a complaint from "Ray" on the first floor that Ms. Hymn had knocked on his door and called him names. He had not opened the door, but said he "had his french knife ready." On the same date, Mr. Marzano wrote a
second note that the police had been to Courthouse Square Apts. twice (at 6:45 p.m.and 11:00 p.m.) for disturbances in Ms. Hymn's apartment, but that no one had signed a complaint. The nature of the alleged disturbances was not stated in the note. Tr. 319-321, Rx-21.

28. Ms. Hymn was very friendly with Barbara Eberhardt, a non-elderly handicapped tenant who had lived at Courthouse Square Apts. Tr.97.

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[7]The Pet Rules also provided that "no pet which is not owned by a resident may be brought onto the project or kept temporarily."Rx-18.

[8]I do not credit Mrs. Murphy's testimony that she required that Ms. Hymn immediately come into compliance with the pet rules by removing all the pets but one. Tr. 494. Mrs. Murphy did nothing to follow-up on the conversation and there is no notation of the alleged violation in Ms. Hymn's tenant file. Further, Mrs. Murphy did not send, nor have Mrs. DeJongh send, a written notice of violation to Ms. Hymn. Ms. Hymn was not contacted again about the alleged pet rule violation until more than three months later, i.e., on July 15, 1994.

[9] On April 12, 1994, Ms. Hymn signed HUD Form 50059, "Owner's Certification of Compliance with HUD's Tenant Eligibility and Rent Procedures" as did Joan DeJongh. This was a prerequisite to her recertification for continued tenancy at Courthouse Square Apts. Cx-51.

29. Mrs. DeJongh was also friendly with Ms. Eberhardt - she described her as a "dear friend of mine." Depos. Tr. 116. Mrs. DeJongh had developed a relationship with Ms. Eberhardt over the years since she worked at Courthouse Square Apts. She visited with her many times and also often saw her in the community room. Ms. Eberhardt sought Mrs. DeJongh's assistance at times on matters relating to every-day living, e.g., on how to straighten out a matter involving an overdue bill for magazines ordered. Mrs. DeJongh helped her resolve the matter and then counseled her about ordering items she could not afford. Tr. 242, 353, 362.

30. Barbara Eberhardt owned a small dog named Benji. On July 11, 1994, Joan DeJongh sent Ms. Eberhardt a letter informing her that, if her dog continued to make "messes," Courthouse Square's management would have to have her dog removed from the building.[10] Stip. 24-26. Tr. 291, Cx-27. Mrs. DeJongh had talked to Barbara numerous

times about her dog making messes, after repeated violations had been reported, and had only threatened to remove the dog after these warnings had not worked to bring about compliance. Tr. 242.

31. On the same day Ms. Eberhardt received the letter, she went to Ms. Hymn and showed her the letter. Tr. 96-99, 101-102, Cx-27, Cx-2. She was distraught and nearly hysterical. Ms. Hymn tried to console Ms. Eberhardt, and to relieve her fears. She told Ms. Eberhardt that she thought it was illegal what management was trying to do, and that she would call DeJongh on her behalf to see what she could do to straighten things out. Ms. Hymn then called Mrs. DeJongh while Ms. Eberhardt was still in her apartment. In a heated conversation that lasted up to five minutes, Ms. Hymn told Mrs. DeJongh that the pet rules were unfair, and that they could not just take Barbara's dog - that they were picking on her because she was disabled. Rx-13. Mrs. DeJongh responded that it was none of Ms. Hymn's business, and that she was interfering in a matter between Ms. Eberhardt and management. Ms. Hymn was angry and loud, she yelled and screamed at

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[10]The letter read: "Dear Barbara, as of Saturday our janitor had to clean up two messes from your dog. You are responsible for your dog, which means the cleaniness [*sic*] of your dog. . . and to clean up any waste of your dog. Urban has spent a lot of money on the new carpet and we expect everyone to help to keep it clean. If this continues we will have to have your dog removed from the building. Enclosed is a copy of the pet rules, please abide by them. Thank you. Joan, Management."

Paragraph 5 of the Pet Rules provided that dogs must excrete and defecate in the area designated for that purpose, and that "the pet may be removed by management should the pet owner repeatedly fail to pick up waste left by their pet."Rx-18.

Ms. DeJongh and used profanities, including the "f___" word which highly offended Mrs. DeJongh.
Tr. 123-124; 322-333.

32. After the conversation, Mrs. DeJongh wrote a note which she put in Ms. Hymn's file. The note is dated July 11, 1994. In it she stated:

> Rayne called me that Barbara had enlisted her help on the letter I gave her for caring for her dog (cleaning up the dogs messes on the carpet in the lobby.) She said I was picking on Barbara because she was disabled. . . Barbara came in later and apologized for Rayne's behavior. Cx-30.

33. Mrs. DeJongh was "greatly" upset by Ms. Hymn's telephone call about Barbara's letter. Because of it, she "lost patience" with Ms. Hymn and thought that something should be done about her. It was for her like "the straw that broke the camel's back." Mrs. DeJongh took some time to calm herself down, to "put myself together again." She sat back and "took deep breaths" and then telephoned Mrs. Murphy. In a trembling voice, she told Mrs. Murphy how disturbed she was about the call and about the "very abusive" way Ms. Hymn had spoken to her. She told Mrs. Murphy that Ms. Hymn yelled and screamed at her, used obscene language, and was very intimidating and verbally abusive to her. She expressed that she was afraid of Ms. Hymn. After listening to Joan and agreeing with her that Mrs. Hymn's conduct was totally unacceptable, Mrs. Murphy

told Joan to serve Ms. Hymn with an eviction notice, i.e.,"Lease Termination Notice". Tr. 93-94, 292 -297, 499, 500-502; Cx-27, DeJongh's Ans., DeJongh's Depos., p. 147.

34. Respondents considered Ms. Hymn to be a problem tenant because of her abusiveness towards management staff as well with other tenants. *See* Courthouse Square Co. Ans. and DeJonghs' Ans.

35. Prior to July 11, 1994, the only contacts Joan DeJongh had with Intervenor was two routine encounters and, in each of the two, Intervenor had acted appropriately. Mrs. DeJongh had chosen not to have contact with Intervenor because she was afraid of and felt intimidated by her. Tr. 310, 328, 499. She was intimidated by Ms. Hymn because of encounters Ms. Hymn had with her husband Preston, with Mr. Marzano, and with other tenants. No other tenant delivered complaints against the DeJonghs to their personal residence. Also, the tone of Ms. Hymn's communications was always harsh and inappropriate. Rx-22. Also, she knew that Ms. Hymn had called the police at least once because of a problem she had, and she knew, as well, that other tenants had called the

police with complaints about Ms. Hymn. Tr. 250, 329, 365-366.

36. On July 15, 1994, Mrs. DeJongh sent Intervenor a Notice of Termination of Lease. Stip. 27, Tr. 105-106, 295, 501; Cx-31.

37. The Lease Termination Notice charged Intervenor with violating her lease by:

> (1) Having several calls to the police for disturbances and removing your boyfriend from the building. (2) Having more than 1 pet in your apartment after being warned that no more than 1 pet is allowed.

The Notice was signed by "Joan DeJongh, Resident Manager & Agent for Landlord." Cx-31.

38. Prior to July 15, 1994, neither Respondent Joan DeJongh, nor Mrs. Murphy, nor any other management agent, had ever given Intervenor written warning that she was violating her lease by having more than one pet in her apartment. Further, prior to July 15, 1994, the only oral warning Ms. Hymn had received regarding her pets was from Mrs. Murphy, who on April 13, 1994, told her she had to get rid of her son's dog "Pepper." Tr. 92-93, 108, 298.

39. Prior to July 15, 1994, neither Respondent Joan DeJongh, nor Mrs. Murphy, or any other management agent, had given Intervenor written warning that she had been violating her lease by creating disturbances. Tr.111-115, 298-299.

40. As of July 15, 1994, neither Respondent DeJongh nor Mrs. Murphy had first-hand knowledge of how many animals Intervenor had in her apartment. Neither knew whether Ms. Hymn continued to house the dog "Pepper" in her apartment. Neither had visited the apartment nor observed Ms. Hymn with more than one pet on the grounds. Tr. 302. Further, there had been no tenant reports that Ms. Hymn had the pets after April 1994.[11]

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[11] The undersigned does not find credible Mrs. Murphy's testimony that, as of July 15, 1994, she had evidence that Ms. Hymn still kept more than one dog in the apartment. Tr. 497. Mrs. Murphy testified that she met with Mr. Marzano and Mrs. DeJongh prior to making the decision to issue the eviction notice and that Mr. Marzano told her Ms. Hymn still housed the dog. Tr. 501-02. However, Mrs. DeJongh didn't mention any such meeting in her testimony, and her Answer to the Charge and her testimony indicated that the decision to initiate eviction proceedings occurred *during* her telephone conversation of July 11, 1994. Further, Mrs. Murphy's trial testimony contradicts her deposition testimony that it was Joan who reported

Tr. 96.

41. On July 15, 1994, the Complainant responded to the Notice of Lease Termination. She sent Respondent DeJongh a letter in which she contested the grounds in the Lease Termination Notice as being unfounded. In her defense she stated again that she had been approved for two pets when she originally signed her lease, and at that time had not been told of the premises of Courthouse Square Apts. Further, she stated that her boyfriend had never been removed from the premises. She stated her belief that she was actually being evicted because of her intervention on July 11, 1994, in a dispute between management and another tenant (Ms. Eberhardt). Tr. 115, 117, Cx-32. Ms. Hymn wrote:

> It is my belief that the real reason I have received a notice of termination of my lease is because of my involvement in a dispute that transpired on the 11th of July, 1994, regarding another tenant and the management. [Cx-32]

42. On August 1, 1994, Mrs. DeJongh issued Ms. Hymn a Demand for Compliance or Possession which demanded that, within three days, Ms. Hymn either come into compliance with her lease conditions or deliver possession of her apartment to her landlord. The lease provisions with which Ms. Hymn was alleged to have been in non-compliance were described as:

> "(1) Having more than 1 pet in the apartment. (2) Several disturbances which resulted in having to call police." Stip. 29, Tr. 121-124, 300-301, [Cx-33.]

43. On August 1, 1994, Courthouse Square Apts. initiated judicial eviction proceedings against Ms. Hymn. Tr. 126-127.

44. During the pendency of the court proceedings, Ms. Hymn wrote another letter to management to which she got no response. In answer to the termination notice, Ms. Hymn offered to terminate her lease because life at Courthouse Square had become

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that Ms. Hymn was in violation of the pet rules and who provided the information which supported the eviction notice. Murphy's Depos. at p. 96. Where there is a conflict between the testimony of Mrs. DeJongh and Mrs. Murphy, I find that Mrs. DeJongh was the more credible witness. Her testimony was more consistent throughout. Finally, although Mrs. DeJongh testified that "we" saw Ms. Hymn walking her dogs, she could not recall when she did so. Tr. 367. This is not inconsistent with the reported sightings of Ms. Hymn with two dogs on September 2, 1994, well after her eviction had been ordered by the court. See Rx-20, Tr. 371.

"unlivable." "I feel termination is best for everyone," she said. Ms. Hymn requested only that she be allowed sufficient time to find another residence before she was required to move. Cx-34 at p.8.

45. Ms. Hymn was not successful in blocking her eviction, and her court-ordered eviction was effective in August, 1994; however, she remained on the premises for several weeks thereafter. Tr.126-127; Stip. 18.

46. On August 22, 1994, Ms. Hymn completed a housing discrimination complaint against Respondents (HUD-903) in which she stated:

> I have been subjected to harasment, discrimination, and invasion of privacy over a period of 13 months by the managers of Court House Square.

She alleged that the harassment and discrimination had occurred because she was 'younger' and mentally retarded. Cx-34

47. On September 2, 1994, Mr. Marzano noted that Ms. Hymn and her boyfriend had been seen getting into the elevator with two dogs. Tr. 371, Rx-20.

48. On or about September 6, 1994, Mr. Marzano wrote a "sticky note" that Intervenor had twice called the police on her boyfriend because she did not want him in her apartment. Tr. 311. Rx-27; Rx-19.

49. Ms. Hymn moved from Courthouse Square Apts. on or about September 9, 1994.

50. Other than by information she included on her application, Ms. Hymn did not inform any of the Respondents or their agents that she was disabled. However, sometime near the middle of her tenancy she told Joan DeJongh that she "suffered from depression." DeJongh's Depos. Tr. 22-23.

51. Ms. Hymn testified that her depression affected her every-day living activities. It interfered with her ability to be gainfully employed -- her attempts at work never lasted more than short periods due to inability to concentrate for more than a brief period of time. She has an inability to become and stay motivated. She has more problems dealing with
her emotions than the average person. Under stress, she gets too emotionally distraught to retain information. She has problems with interpersonal relationships - she has suffered

multiple marriages and has had problems with maintaining good relations with family members. Tr. 72-76.

52. During her tenancy, Ms. Hymn was not under the care of any psychiatrist, psychologist, therapist or other mental health professional. Further, she took no prescription medication for her depression. Tr. 164.

53. During Intervenor's residency at Courthouse Square Apts., both Mrs. Murphy and Joan DeJongh knew that Ms. Hymn had been determined eligible for residency at Courthouse Square based on her disability. Tr. 242, 489. Her application showed that she was disabled, and that she was not elderly. Neither Respondent Joan DeJongh nor Mrs. Murphy saw any evidence that Ms. Hymn had a physical handicap. Mrs. DeJongh regarded Ms. Hymn as having a mental problem because she thought something had to be wrong with Ms. Hymn because of her inappropriate behavior. However, she also thought much of Ms. Hymn's behavior was caused by being intoxicated. Depos. Tr. 151-152; Tr. 235-244, 365-66.

54. Mrs. Murphy had little contact with Ms. Hymn. She had regular telephone contact with Joan DeJongh and visited the Courthouse Square Apts. frequently. During her contacts with Joan DeJongh, Ms. Hymn's name would sometimes come up in discussion. Tr. 488.

55. At all relevant times, Respondents' written eviction procedures applicable to Courthouse Square Apts. "strongly recommended" that, prior to giving a tenant a notice terminating his or her lease for material non-compliance other than for non-payment of rent, the resident manager (1) give (and keep records of) verbal and written warnings to the tenant of the lease violations, and (2) send the tenant a certified letter detailing the violations and stating that evictions could commence if the violations continue. Cx-4, p.5

56. At all relevant times, it was the general practice of Joan DeJongh, as resident manager, to give written notice to all tenants when lease violations were brought to her attention. Tr. 298.

57. From 1993 through summer of 1995, Courthouse Square Apts. issued an eviction notice to only one other Courthouse Square Apts. resident. Tr. 253. In 1994, an eviction attempt was made against a handicapped tenant after the woman repeatedly failed to heed oral warnings given her by Mrs. Murphy that she not hug other residents in a particular

way. Other residents were offended by the manner in which the woman hugged them. Eviction proceedings were discontinued after the woman filed a discrimination complaint with HUD. Tr. 490-491.

58. Mrs. Murphy testified that the pet violation basis for Ms. Hymn's eviction was because she kept a third pet, the extra dog "Pepper," after having been warned about it, not because she had the dog and cat that Ms. Hymn claimed Mr. Melarane had allowed her to keep. Tr. 498, 501-502.

59. Albert Crumbaugh, an elderly, non-handicapped person, has been a tenant at Courthouse Square Apts. continuously from about 1985 to the date of trial. He resides in apartment 103. Mr. Crumbaugh had kept at least three cats in his apartment since about 1993. He acquired a cat named "Gigi" in 1985 or 1986, and then acquired two more - "Tommy" and "Busy" - in or about 1993. Mr. Crumbaugh often took all three cats for walks around the property throughout the period at issue and had been "rather famous" around the complex for his cats. During the relevant time period, Mr. Crumbaugh was never warned that he housed too many cats.[12]

60. Some of the maintenance people told Mrs. DeJongh that Mr. Crumbaugh had more than one cat. Tr. 275. Further, based on Mr. Crumbaugh's open and notorious possession of the cats, both Mrs. DeJongh and Mrs. Murphy knew that he had owned more than one cat since 1993. Tr. 275-276, 286-288. Cx-17.

61. Irene Atwell, Manuel Calderon, John Archuleta, Grace Montes, and Virginia Romero were all long-term tenants of Courthouse Square Apts. They were among the elderly tenants and were not considered by management to be handicapped. Tr. 223-224, 233-237, 239, 241, 344; Cx-6 -7, Cx-13 - 14, Cx-16-18.

62. On October 14, 1993, Mrs. DeJongh issued Ms. Atwell a letter warning her that she was violating her lease by engaging in conduct that disturbed her neighbors. The letter stated that Ms. Atwell had assured management that she was living alone, yet management was receiving lots of complaints of children in her apartment making lots of noises and crying throughout the night. She was reminded that her complex was a complex for the

elderly and children were not allowed to live there. Mrs. DeJongh wrote that Ms. Atwell

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[12] Testimony of Diedre Mitchell, Mr. Crumbaugh's daughter. Tr 372-384.

was in violation of her lease and that this was her "last warning" before further action would be taken.[13] Cx-18; Tr. 339-41.

63. On December 22, 1993, Mrs. DeJongh issued Mr. Calderon a letter warning him that he was violating his lease by engaging in conduct that disturbed his neighbors. In it she stated that the night-janitor had observed, and management had received, several complaints about children in his apartment running and making noises in the seventh floor hallway. He was told that he was responsible for his guests and children and that they had created disturbances in violation of his lease.[14] He, too, was admonished not to let the disturbing conduct happen again. Cx-16.

64. On June 27, 1994, Mr. Marzano stated in a note placed in Mr. Archuleta's file that Mr. Archuleta was into his second night of drinking when he carried a hammer outside. The hammer was for his protection, so Mr. Archuleta said. He said also that his son was bringing him a gun which he would use for his protection. The note indicated that Mr. Marzano took the hammer from Mr. Archuleta and carried it into the office. On the next day, Mrs. DeJongh sent Mr. Archuleta a letter referencing his behavior "over the last couple days," which set forth the behavior as follows:

> (1) telling the manager he was going to kill a resident; (2) carrying a hammer around outside the building for his protection; and (3) being drunk and disorderly. He was warned that if his behavior of threatening other tenants continued, he would be given a ten day notice of termination of lease. Cx-13.

65. On August 22, 1994, Mrs. DeJongh gave Ms. Montes a letter warning her that she was engaging in conduct that disturbed her neighbors and requesting that she discontinue such conduct. Repeated complaints were lodged against Ms. Montes because she would walk the fourth floor hallway in the early morning hours. Her walking would disturb tenants on the floor below. As a result of the continuing complaints, Mrs. DeJongh sent Ms. Montes a letter on August 22, 1994, requesting that she refrain from walking so early in the morning or to do her walking on the first floor. Ms. Montes refused. Cx-7 When complaints continued, Mrs. DeJongh sent Ms. Montes a letter on December 12, 1994, requesting again that she change her walking pattern to resolve the problem, which request was said to be a "reasonable accommodation." Cx-6. When Ms. Montes declined to do

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[13] The rules limited occupancy to those persons listed on the lease or rental application. Cx-1 p.2

[14] Residents were not to "make or permit noises or acts that will disturb the rights or comforts of neighbors." Cx-1, para. 13, item E.

so, management, looking to resolve the problem another way, purchased at is own expense, a treadmill for her walking enjoyment. Tr.270-72; 345.

66. On October 5, 1994, Mrs. DeJongh sent Ms. Romero a letter warning her that she was violating her lease by engaging in conduct that disturbed her neighbors and requesting that she discontinue such conduct. She was told that she must cease: (1) banging on her neighbors wall in the evenings, in a "disorderly manner as to disturb the residents in the building;" and (2) calling residents undesirable names and making unnecessary comments to the residents. Mrs. DeJongh had orally warned Ms. Romero many times about banging on the walls before she sent the letter, however, earlier warnings had not been heeded and the disturbance had continued for quite a while. Tr. 347. Ms. Romero was warned that if her disturbances did not stop, her lease might be terminated. Cx-14

DISCUSSION

The original Fair Housing Act (FHA) prohibited discrimination solely on the basis of race, color, religion, or national origin. The Fair Housing Amendments Act of 1988, 42 U.S.C. § 3604 ("FHAA") was passed as an amendment to the FHA of 1968 and extended "the principle of equal housing opportunity to handicapped persons." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 13 (1985). Section 3604(f) provides that it shall be unlawful for a housing provider:

> (1) To discriminate in the rental, or to otherwise make unavailable or deny, a dwelling to any renter because of a handicap of - (A) that renter,
>
> (2) To discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of - (A) that person

42 U. S. C. § 3604(f)(1)-(2). A plaintiff can prove handicap discrimination under § 3604(f) by showing (1) intentional discrimination, or disparate treatment, (2) discriminatory effect, or disparate impact, or (3) failure to provide reasonable accommodations. *Mountain Side Mobile Estates Partnership v. Secretary*, 56 F. 3d 1243 (10th Cir. 1995); *Roe v. Housing Authority of Boulder*, 909 F. Supp. 814, 820 (D. Colo. 1995). *See also Grubbs v. Housing Authority of Joliet*, 2 FH - FL (Aspen) ¶16,190 at 16,190.7 (N. D. Ill. 1997). The Charging Party asserts a claim under two theories: disparate treatment and failure to provide reasonable accommodation.

I. Disparate Treatment

Courts have generally applied the shifting burdens analysis of *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), (a three-part, burden-shifting test articulated by the Supreme Court for Title VII cases) to determine whether there has been unlawful discrimination in a disparate treatment case brought under 42 U. S. C. §§ 3604(a) and (b). Because the relevant language in § 3604(f) is identical to that in (a) and (b), the same test is applicable in this FHAA claim. *See Mountain Side Mobile Estates Partnership v. Secretary*, 56 F. 3d 1243 (10th Cir. 1995)*; HUD v. Burns Trust*, 2 FH - FL (Aspen) ¶ 25,092 (HUDALJ 1994) and *HUD v. Dedham*, 2 FH - FL (Aspen), ¶ 25,015, 25212 (HUDALJ 1991).

Under *McDonnell Douglas*, the burden is initially on the complainant to make a *prima facie* showing of discrimination by a preponderance of the evidence. *Mountain Side Mobile Estates Partnership v. Secretary of HUD*, 56 F. 3d 1243, 1250-51 (10th Cir. 1995)*;*
Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The *prima facie* showing, when made, raises a rebuttable presumption that the respondent's conduct amounted to unlawful discrimination. *Mountain Side*, 56 F. 3d at 1251. Once the presumption is raised, the burden shifts to the respondent to rebut it by articulating some legitimate, nondiscriminatory reason for the action taken. *Burdine*, 450 U.S. at 254. Finally, the burden shifts back to the complainant to prove, again by a preponderance of the evidence, that the respondent's stated justification for its action was not the true reason but was in fact merely a pretext to disguise discriminatory conduct. *Id*.

A. Discrimination in the terms, conditions and privileges of rental

In this case, the Charging Party alleges Respondents violated 42 U.S.C. § 3604(f)(1)(B) by imposing different terms, conditions and privileges of rental based on the following conduct:

> (1) not giving Ms. Hymn a written warning before sending her an eviction notice as they did other non-handicapped tenants; and
>
> (2) evicting Ms. Hymn for conduct for which they did not evict non-handicapped tenants.

In *Keys Youth Services, Inc. v. City of Olathe, Kansas*, 53 F. Supp. 2d. 1284 (D.C. Kan. 1999) *revers'd in part* 248 F.3d 1267 (10th Cir. 2001), the district court set forth the elements of proof in a FHAA claim of handicap discrimination. It stated that to prevail on

a FHAA claim under 41 U.S.C. 3604(f)(2)(A), a plaintiff must prove that a defendant:

> 1. discriminated against any person in the terms, conditions, or privileges of sale or rental of a dwelling; or
> 2. in the provision of services or facilities in connection with such dwelling;
> 3. because of a handicap of that person.

53 F. Supp. 2d. at 291. *See also Roe v. Housing Authority of Boulder*, 909 F. Supp. at 819.

A plaintiff can demonstrate a *prima facie* case of disparate treatment under 42 U. S. C. § 3604(f)(2)(A) in the terms and conditions of apartment rental by showing, (1) that she was a member of a protected class of persons under the statute, (2) that she was similarly situated to persons not protected by the statute, and (3) that she was treated differently (i.e., less favorably) than members of the unprotected class of persons. *Grubbs*, 2 FH-FL (Aspen) ¶16,190 at 16,190.12.

The first element of the *prima facie* showing is not contested here. Respondents state that: "[b]y virtue of the fact that Ms. Hymn was not elderly, it was therefore uncontroverted that she was disabled and thus a member of a protected class under the FHA."[15] We turn then to the second and third elements of the *prima facie* case.

In order to prove that Ms. Hymn was similarly situated to a non-disabled tenant, she needed to show that a non-disabled tenant had committed a comparable infraction of his or her lease agreement. *See Grubbs*, ¶ 16,190 at 16,190.15. The record shows that there were non-handicapped tenants at Courthouse Square who were in violation of their lease during the time of Ms. Hymn's tenancy. At least one of them was alleged by Respondents to be in violation of the pet rules, and a number of others were alleged to be in violation of the provision prohibiting conduct which disturbs other tenants. Thus, I conclude that Ms. Hymn has established the second element of the *prima facie* case of

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[15] Respondents' proposed Findings of Fact at ¶96.

disparate treatment - that she was similarly situated to members of the unprotected class.[16]

The Charging Party has established that Intervenor was treated differently, and less favorably, than other tenants at Courthouse Square who were not handicapped. Albert Crumbaugh, an elderly, non-handicapped tenant, lived at Courthouse Square Apts. since

1983, and openly and notoriously kept at least three cats in his apartment continuously from about1993 to January, 2001. Further, testimony shows that although management knew or should have known of his ownership of the three cats, Mr. Crumbaugh received no warning, oral or written, regarding any violation of the pet rule during the time that Ms. Hymn was a tenant. Accordingly, the Charging Party has established that Intervenor was subjected to disparate treatment in the enforcement of the terms and conditions of her lease as to the pet policy, based on the favorable treatment Respondents accorded Mr. Crumbaugh.

The evidence also supports a finding that other tenants, who were not handicapped, created disturbances which violated their leases, but unlike Ms. Hymn, they were sent written warnings. Also, they were not evicted because of their violations. The evidence shows that Ms. Hymn was treated differently than Irene Atwell, Manuel Calderon, John Archuleta, Virginia Romero and Grace Montes, all non-handicapped individuals. All of these individuals were sent written warnings of their lease violations, and none of them was evicted. Thus, the Charging Party has presented evidence of disparate treatment of tenants who create disturbances sufficient to raise a presumption of discrimination based on handicap status.

A *prima facie* showing raises a rebuttable presumption that the respondent's conduct amounted to unlawful discrimination. *Mountain Side*, 56 F. 3d at 1251. Once the presumption is raised, the burden shifts to the respondent to rebut it by articulating "some legitimate, nondiscriminatory reason" for the action taken. *Burdine*, 450 U.S. at 254. The respondent can satisfy its burden at this stage of the analysis by producing admissible evidence from which the trier of fact can rationally conclude that the denial of housing was not motivated by discriminatory animus.

Respondents offer as reasons for their action to terminate Ms. Hymn's tenancy,

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[16]In order to prove that she was similarly situated to a non-disabled tenant, plaintiff would need to show that the tenant had committed a comparable infraction of his lease term. Grubbs ¶16,190 at 16,190.15.

Ms. Hymn's violation of her lease by her failure to comply with the one-pet rule, and her abusive behavior towards management staff. Respondents produced evidence to support a finding that the lease violations occurred. The evidence shows that there was a written pet policy that limited the number of pets to one per household, that Ms. Hymn housed more than one pet in her apartment, and that she was warned in April 1994 that she had too many pets in her apartment. Additionally, the evidence shows that other tenants complained repeatedly about Ms. Hymn's conduct and on occasions, even called the police with complaints about her. Further, there is evidence that the Complainant was abusive towards staff, especially Joan DeJongh. Accordingly, I find that Respondents' proffered reasons for evicting Ms. Hymn are legitimate reasons and facially nondiscriminatory. Accordingly, I find the Respondents have rebutted the presumption raised by the *prima facie* case.

The burden now shifts back to the Charging Party to prove, by a preponderance of the evidence, that the Respondents' stated justification for their action was not their true reason but was in fact merely a pretext to disguise discriminatory conduct. *Mountain Side*, 56 F. 3d at 1221. To show pretext, the Charging Party and Intervenor can show that a
discriminatory reason more than likely motivated the Respondents or that their proffered reasons are unworthy of credence. This burden merges with the ultimate burden of persuasion on the question of intentional discrimination. The Supreme Court has stated "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993) (quoting *Burdine*, 450 U.S. at 253) (emphasis in original); *accord, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989); *Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

The Charging Party and the Intervenor argue that Respondents' proffered reasons for evicting Intervenor are unworthy of credence and are pretext for discrimination. The undersigned agrees, in part.

I conclude that Respondents' claim that they evicted Intervenor for causing disturbances and of being abusive to staff was not pretextual.

The evidence shows that the desire to see Ms. Hymn evicted emanated from Mrs. DeJongh. That Mrs. DeJongh had been terribly shaken by her July 11,1994, encounter with Ms. Hymn was obvious from her manner and testimony at trial. Even at trial, she seemed disturbed by her recollection of the encounter. I found her to be a credible witness

as to the impact of Ms. Hymn's verbal assault on her during their conversation on July 11, 1994.[17]

The evidence shows that Mrs. DeJongh herself had little personal interaction with Ms. Hymn - only two encounters prior to July 11, 1994, both uneventful. However, she had come to be intimidated by Ms. Hymn - "scared of her"- based on information she had learned about Ms. Hymn from her husband, Preston, and from Ed Marzano. She had learned that Ms. Hymn got drunk at times, that she got into fights with her boyfriend, that she was offensive to other tenants and that some of the tenants were afraid of her. Mrs. DeJongh was intimidated by the harshly critical notes Ms. Hymn slipped under the

DeJonghs' door. No other tenant left notes under the door of the DeJongh's personal residence. Tr. 353. Based on this information, Mrs. DeJongh had already decided, before July 1994, that she just did not want to have any dealings with Ms. Hymn. Tr. 330, 328, 353.

Then came the encounter with Ms. Hymn concerning Barbara Eberhardt. Mrs. DeJongh considered herself a good friend of Ms. Eberhardt. She had warned Barbara time and again about properly supervising her pet, giving her every chance to comply with the rules, and she did not appreciate Ms. Hymn's accusation that she was treating Barbara badly. Mrs. DeJongh had tried to explain to Ms. Hymn why she could not allow Barbara to continue to let her dog make messes - they had put new carpet down, and at great expense, and Barbara was required to take care of her dog - but Ms. Hymn paid no attention. She was highly offended by Ms. Hymn's accusatory tone, by her yelling and screaming, and especially by Ms. Hymn's vulgar and obscene language. Mrs. DeJongh testified that her experience with Ms. Hymn during that conversation was the "last straw." She was totally exasperated by Ms. Hymn's conduct. It had so upset her that she had to take time to calm herself before she could call Mrs. Murphy to see what could be done about the situation. Mrs. Murphy, sensing Mrs. DeJongh's outrage at the treatment she had received, and being aware generally of the numerous other complaints about Ms. Hymn's conduct, authorized the eviction notice.

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[17]There is no merit to the Charging Party's argument that I should reject Respondents' attempts to claim eviction for more general disturbances, and alleged abusive encounters with Mrs. DeJongh and other staff, and restrict consideration to the limited reasons for the eviction stated by Respondents on the termination notices, i.e., to "disturbances in the hallway" and "for having police called." C.P. Post-Trial Brief at p.28. The Charging Party had adequate pretrial notice of all reasons alleged for Ms. Hymn's eviction. *See Murray Construction L.L.C. v. Hicks*, 2 FH-FL (Aspen) ¶18,307, 18,307.4 (S. D. 1-10-01).

Ms. Hymn argues that the timing of the eviction notice shows pretext for handicap discrimination - that the temporal proximity between Ms. Hymn's intervention on behalf of Barbara Eberhardt and the sending of the eviction notice within days thereafter strongly suggests a causal connection between the two events. I agree. However, although pretext from the timing and manner of a defendant's action can be inferred, (*Cisneros v. Wilson*, 226 F. 3d 1113 at 1130 (10th Cir. 2000), it need not be. In this case I do not find pretext. I conclude that it was not the fact that Ms. Hymn intervened on behalf of Ms. Eberhardt that triggered the eviction notice, but the *manner* in which she did so. The manner in which she confronted Joan DeJongh was one more example of her continuing disturbing behavior.

Respondents initially claimed that Ms. Hymn violated the one-pet rule as part of the reason for her eviction. At trial Mrs. Murphy testified that the violation was because Ms. Hymn continued to keep the extra dog ("Pepper") after having been warned that she could not keep both dogs. The Charging Party argues that the latter reason lacks credibility and therefore is pretextual. I agree. I do not credit Mrs. Murphy's testimony that she had evidence on July 15, 1994, that Ms Hymn continued to keep "Pepper." See Findings of Fact ¶¶40 and 41. Further, Mrs. Murphy's lack of action in following up with a warning notice to Ms. Hymn immediately after she observed the pets on April 13, 1994, belies her

contention that eviction was warranted because of the number of pets Ms. Hymn kept, or because Ms. Hymn still kept the additional pet ("Pepper"). Moreover, although Respondent DeJongh testified that it is the policy and practice of Courthouse Square both to document violations of the lease provisions and to put the documentation in the tenants' files, there was no documentation of a pet violation in Intervenor's file (either for having more than one pet or for continuing to keep the dog "Pepper"), and she received no written warning of a pet violation. In this regard, Mrs. DeJongh testified that Ed Marzano was very diligent in recording every violation that he observed, and every complaint of a violation that he received. Finally, the fact that Mr. Crumbaugh was allowed to keep several cats over the years before and after Ms. Hymn's tenancy, shows that the one-pet rule was not enforced. I find the reason for eviction based on the pet rule violation to show pretext. However, I do not find it to be pretext *for discrimination* for the reasons discussed below.

Even if the reasons offered to explain the disparate treatment were rejected as entirely pretextual, the Charging Party would not necessarily prevail. The Complainant, at all times, bears the ultimate burden of proof on the issue of intentional discrimination. *St.*

Mary's Honor. 509 U.S. at 507-508. A finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without establishing intentional discrimination, i.e., that the true reason for the adverse action was illegal discrimination. *Fisher v. Vassar College,* 114 F.3d 1332 (2nd Cir. 1995). "Discrimination does not lurk behind every inaccurate statement."*Fisher* at 1338. *See also Quaratino v. Tiffany & Co.*, 71 F. 3d 58, 64 (2d Cir. 1995) ("An employer's reason for termination cannot be proven to be a pretext for discrimination unless it is shown to be false *and* that discrimination was the real reason.").

The Charging Party has failed to carry the ultimate burden of proving that the difference in treatment by Respondents of Ms. Hymn and non-handicapped tenants was motivated by unjustified considerations of Ms. Hymn's disability. *See Keys*, 52 F. Supp. 2d at 1300. Ms. Eberhardt was handicapped, as was Ms. Hymn, yet she received written warnings about alleged violations of her lease, and she was not evicted. This fact alone may be sufficient to defeat Complainant's claim of handicap discrimination. *See Grubbs*, 2 FH -FL (Aspen) ¶16,190 at 16.190.14. What set Ms. Hymn apart from Ms. Eberhardt and the other named tenants at Courthouse Square Apts. was the fact and extent of her abusive interactions with Mrs. DeJongh, other staff and other tenants. Based on the evidence presented, no other tenant, handicapped or non-handicapped, generated as many complaints as Ms. Hymn and no other was as abusive to staff as Ms. Hymn had been. Accordingly, considering all the circumstances, I conclude that the Charging Party has failed to establish that the true reason for Ms. Hymn's disparate treatment by Respondents in the terms and conditions of her lease was handicap discrimination.

B. Discrimination by denial of rental (i.e., continued tenancy) because of handicap

The Charging Party alleges that Respondents discriminated against her in the rental of her apartment by terminating her tenancy because of her handicap in violation of 42 U. S. C. § 3604.

Section 3604(f) of the FHAA provides that it shall be unlawful:

> (1) To discriminate in the rental, or to otherwise make unavailable or deny, a dwelling to any ...renter because of a handicap of – (A) that renter

42 U. S. C. § 3604(f)(1)(A); See also 24 C.F.R. § 100.202(a).

To establish a *prima facie* case of handicap discrimination by eviction of a sitting tenant under § 3604(f)(1)(A), Ms. Hymn has to demonstrate: (1) that she is a member of a

protected class, i.e., that she was a renter with a handicap; (2) that she was evicted; and 3) that Respondents, their agents or employees, knew or had reason to know, of her handicap prior to evicting her. *See HUD v. Burns Trust*, 2 FH- FL (Aspen) ¶ 25,092 (HUDALJ 1994), and *HUD v. Dedham Housing Authority*, 2 FH- FL (Aspen) ¶25,015, 25,212 (HUDALJ 1991) .

The first and second elements of the *prima facie* are not contested here. The evidence supports finding that Ms. Hymn is a member of a protected class (persons with handicap) (see discussion in part I.A.) and that she was evicted. The critical issue, then, is whether Respondents, their agents or employees knew or had reason to know, of Ms. Hymn's handicap prior to evicting her.

Respondents knowledge of Ms. Hymn's disability

The Charging Party has the burden of establishing that Respondents knew, or should have known, of Ms. Hymn's handicap. Knowledge of a person's handicap can be obtained in several different ways - directly from the handicapped person, by observation of the handicapped person, or from third party sources (as e.g. statement from medical professionals or review of medical records), or a combination of these. *Roe,* 909 F. Supp. 2d at 821. The Charging Party contends that Respondents should have known Intervenor had a severely limiting mental impairment because information they had on file showed clearly that she was not elderly and because she had no obvious physical impairments.

Although Respondents had information derived from Ms. Hymn's rental application that she had been determined to be disabled and was receiving Social Security

disability benefits, that information did not disclose her specific disability or the nature of any resulting limitations. Ms. Hymn did not inform Respondents of her specific disability or the nature of her disability, and there is no evidence that they became aware of the information in some other way. The Respondents were not provided any medical records documenting the nature and severity of her alleged impairment.

Midway through her tenancy Ms. Hymn told Joan DeJongh that she suffered from "depression," and Mrs. DeJongh thought that Ms. Hymn had a "mental problem" based on her observed and reported behavior. That is the extent of Respondents' knowledge regarding the details of Ms. Hymn's handicap. Such information is insufficient to establish that Respondents knew, or should have known, that Ms. Hymn's abrasive, abusive and anti-social conduct was caused by a legally cognizable handicap. Even if Intervenor carried a diagnosis of clinical depression, the record does not show that her

conduct was consistent with such a diagnosis. There is no evidence from a mental health professional establishing precisely what Ms. Hymn's disability is, or describing behaviors symptomatic of her illness.

Further, that Ms. Hymn had no obvious physical impairment is no reason to conclude that her alleged disability had to be mental. Some severe physical impairments are detected only by medical professionals.

Moreover, there was nothing about Ms. Hymn's behavior on July 11, 1994, or at any time leading up to that date, that made it obvious that she had a severely limiting mental impairment. She was aggressive and anti-social, verbally abusive, and used obscene language, but both handicapped and non-handicapped people are known to act in such way. *See Olson v. Dubuque Community*,137 F 3d. 609 (8th Cir. 1998) (discharge for poor performance - history of depression; claim that her withdrawal, poor interaction with co-workers and her supervisors, and episodic personality conflicts, were manifestation of a disability. Court held that without more, the evidence was insufficient to show behavior was the result of a disability). *See also Grubbs.* Several complaints about reported activities showed that her drinking was the likely cause of her behavior. Mrs. DeJongh thought that much of Ms. Hymn's abusive behavior occurred when she was intoxicated. Ms. Hymn had fights with her boyfriend, which at times led her to call the police to have him removed from her apartment. Non-handicapped people get involved in domestic disputes, as well.

Unfounded assumptions about how persons with handicap behave must not be made. Housing providers must not be put in the untenable position of having to guess a tenant's diagnosed impairment. To do so would engage us in exactly the type of stereotyping the FHAA was designed to prohibit. The FHAA's legislative history declares

that the statute "repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations . . . are specifically rejected as grounds to justify exclusion." H. R. Rep. No. 100-711 at 18, 1988 U.S.C.C.A. News at p. 2179.

Even assuming that Respondents had knowledge of Ms. Hymn's specific disability, the Charging Party has the burden of proving that they evicted Ms. Hymn *because of* that disability. The Charging Party argues that the evidence establishes that fact in this case. I am not persuaded.

The Charging Party argues that Respondents evicted Ms. Hymn because, based on irrational stereotyping of the mentally disabled, they feared her and wanted to be free of her for that reason. It asserts that this predisposition against the mentally disabled is shown by: 1) Joan DeJongh's unfounded fear of Ms. Hymn and Ed Marzano's apparent dislike for her; 2) evidence that Mrs. DeJongh spent more time at Courthouse Square Apts. with the elderly than with the handicapped; and 3) evidence that Respondents, in evicting Ms. Hymn, failed to follow their own procedures for dealing with lease violations. I am not persuaded by any of these reasons that Ms. Hymn was evicted because of her handicap. The reasons give no basis to infer any discrimination, much less handicap discrimination.

For the above reasons, as well as the reasons discussed in Part I.A, I find that the Charging Party has failed to carry its burden of establishing that Respondents intentionally discriminated against Ms. Hymn in the rental of a dwelling by terminating her tenancy because of her handicap in violation of 42 U. S. C. § 3604(f)(1)(A).

II. Reasonable Accommodation

The Charging Party contends that Respondents failed to provide reasonable accommodation for Ms. Hymn's handicap as required by 42 U.S.C. § 3604(f). Under that section, a landlord must:

> (B) . . . make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a person equal opportunity to use and enjoy a dwelling.

42 U.S.C. § 3604(f)(3).

Because handicapped persons have special needs, Congress recognized that more than a mere prohibition against disparate treatment was necessary in order that

handicapped persons receive equal housing opportunities. *H. R. Rep. No. 711, 100th Cong., 2nd Sess. 25, reprinted in 1988 U. S. Code Cong. and Admin. News, 2186.* Unlike other forms of discrimination proscribed by the Act, Congress recognized that discrimination resulting from failure to accommodate handicaps when it is reasonable to do so, is often the result of "benign neglect" rather than intentional discrimination. *Alexander v. Choate,* 469 U. S. 287, 295 (1985).

Congress intended that the Act be implemented in a manner consistent with Section 504 of the Rehabilitation Act, H.R. No. 711 at 25, reprinted in 1988 U. S. Code and Admin. News, 2173. Cases interpreting Section 504 hold that an accommodation which permits employees to experience the "full benefit" of employment must be made unless the accommodation imposes an "undue financial administrative burden" on a Respondent or requires a "fundamental alteration" in the nature of its program. *Southeastern Community College v. Davis*, 442 U. S. 397 (1979). A refusal to take modest, affirmative steps to accommodate persons with a handicap, may well violate Section 504. *Nathanson v.*
Medical College of Pennsylvania, 926 F. 2d 1368, 1384, (3rd Cir. 1991), *citing Alexander v. Choate*, 469 U. S. 287, 301, n.20.

The Charging Party contends that Respondents had an affirmative duty to reasonably accommodate Ms. Hymn's handicap and that they took no steps to fulfill that duty. Respondents, it alleges, "never counseled Complainant about her behavior and never suggested that she get any outside help in controlling her alleged disturbances." Charging Party's Post-trial brief at p.29. Respondents counter that they were not required, in the circumstances of this case, to make any accommodation, because they did not know of the specific nature of Ms. Hymn's disability, or of the need for reasonable accommodation. More specifically, Respondents argue that even though they were aware that Ms. Hymn had a history of a disability, they did not know what the specific disability was, or of the limitations, if any, that sprang from it.

In order to prove that Respondents discriminated against Ms. Hymn by failing to accommodate her handicap, the Charging Party must demonstrate the following: 1) that Ms. Hymn suffers from a handicap defined in 42 U. S. C. § 3602(h); 2) that Respondents knew of her handicap or should reasonably have been expected to know of it; 3) that accommodation of her handicap may have been necessary to afford her an equal opportunity to continue to use and enjoy her apartment (i.e., to be able to remain in her apartment without significantly disturbing other tenants or management staff); and 4) that Respondents failed to make such an accommodation. *See Roe v. Housing Authority of the City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995); *Grubbs v. Housing Authority of Joliet*, 2 FH - FL (Aspen), ¶16,190, (N. D. Ill. 1997); *HUD v. Dedham Housing Authority*,

2 FH - FL (Aspen),¶ 25,015 at 25,212 (HUDALJ 1991); *HUD v. Burns Trust* , 2 FH - FL (Aspen), ¶ 25,092 (HUDALJ 1994); *HUD v. Riverbay Corp*., 2 FH - FL (Aspen) ¶ 25,280 (HUDALJ 1995); and *HUD v. Dutra*, 2 FH - FL (Aspen), ¶ 25,130 (HUDALJ 1996).

Moreover, in proving that accommodation of a handicap may be necessary, courts have required proof that there was a link between the handicap and the reason for which the handicapped person was evicted. *See Roe*, 909 F. Supp. 814 at 819 (D. Colo. 1995) ; *Grubbs* ¶16,190 at 16,190.14; and *Talley v. Lane*, 13 F. 3d 1031 (7th Cir. 1994).

The evidence establishes that Ms. Hymn has a record of having a disabling impairment. However, the Charging Party's claim must fail for it has failed to establish elements two and three of its *prima facie* case. I have already determined that the Charging Party failed to established that Respondents knew or should have known of Ms. Hymn's specific handicap. (See discussion in Part I, B.). The Charging Party has also failed to establish that accommodation of Ms. Hymn's handicap was necessary in Ms. Hymn's case.

In general, the handicapped person must request a reasonable accommodation in order to trigger a duty on the part of the landlord to accommodate the handicap. *See Frazier v. City of Grand Lodge, Michigan*, 2 FH- FL (Aspen) ¶16,502 (W. D. Mich. 2001) (the operator of an adult foster care facility did not establish a reasonable accommodation claim against the municipality where he did not request a reasonable accommodation before filing the lawsuit.). *See also HUD v. Dutra*, 2 FH -FL (Aspen) ¶ 25,130 (HUDALJ 1996). This request should set forth the nature of the person's disability and his or her wish to be accommodated. *Woodman v. Runyon*, 132 F. 3d 1330, 1343-44. (10th Cir. 1997). However, the employee's failure to request accommodation is not fatal to his claim in certain limited instances, e.g., where his handicap and the need for accommodation are obvious to the employer.[18]

Thus, in this case the Charging Party has the burden of establishing that an accommodation of Ms. Hymn's handicap was reasonable and necessary to allow her the opportunity to enjoy her tenancy at Courthouse Square Apts. without disturbing other tenants or violating her lease. *See Keys Youth Services, Inc. v. City of Olathe*, 52 F. Supp 2d 1284 at 1304 (D. Kan. 1999), *rev'd in part*, 248 F., 3d 1267 (10th Cir. 2001) (plaintiff

who failed to produce evidence that an accommodation was necessary failed to establish

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[18]*See Barnett*, 228 F. 3d at 1108. An employer should initiate the process without being asked if the employee's disability and the need for accommodation is obvious to the employer. Also an employee need not request reasonable accommodation where he knows that it would be futile to do so., e.g. where the employer has a policy that per se violated the ADA. *Norris v. Allied*, 948 F. Supp. 1418, *affirmed as Norris v. Sysco Corp*. 191 F. 3d 1043 (9th Cir. 1999).

handicap discrimination). *See also, Groner v. Golden Gate Gardens Apartments*, 250 F. 3d 1039 (6th Cir. 2001).

The evidence is uncontradicted that Ms. Hymn made no request for accommodation in this case prior to her eviction. In this regard, a request for accommodation which comes after the completion of the discriminatory act does not provide coverage under the FHA. *See Cisneros v. Wilson*, 226 F.3d 1113 at 1127 (10th Cir. 2000) (the determination as to whether an individual is a qualified individual with a disability must be made at the time of the challenged discrimination); *Mole v. Buckhorn Rubber Products, Inc*., at 1218 (post-termination requests are not properly viewed as requests for accommodation); *Wooten v. Farmland Foods*, 58 F.3d 382,386 (8th Cir.) (ADA protections cease after an employee is terminated). *See also Johnson v. Otter Tail County*, _F. 3d__(8th Cir, 6/14/2001). Further, the Charging Party has not established that it was "obvious" that Ms. Hymn had a disability which was linked to her disturbing behavior, and thus that Respondents should have known that accommodation was necessary. (See discussion Part I.B)

The Charging Party argues that Respondents were required to make reasonable accommodation even though Ms. Hymn did not request an accommodation. Citing the case of *Roe v. Housing Authority of the City of Boulder*, 909 F. Supp. 814 (D. Colo. 1995), they assert that the law places on housing providers an affirmative duty to reasonably accommodate the handicapped person, and that this is so whether the handicapped person requested accommodation or not. According to the Charging Party, *Roe* stands for the proposition that "when a housing provider knows a tenant has a mental handicap, the housing provider has an obligation to reasonably accommodate the tenant before the housing provider may evict the tenant." It asserts that in *Roe* the court required the housing provider to provide reasonable accommodation to the tenant even thought the tenant had not requested accommodation.[19] Charging Party's Post-trial brief at 34.

The Charging Party's reliance upon the District Court judge's decision in *Roe* does nothing to advance its position. Nothing in the decision eliminates the burden on the plaintiff to establish both that the respondent was aware of her handicap and that a reasonable accommodation was necessary. In denying the motion for summary judgment, the court acknowledged Roe's burden to prove: 1) whether Roe was handicapped or disabled; 2) whether defendant had knowledge of Roe's handicap; and 3) whether Roe's alleged handicap or disabilities, (bipolar disorder and uncorrected hearing impairment),

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[19]Mr. Roe charged the landlord with violations of the FHAA, the ADA and the Rehabilitation Act of 1973. *Id.* at 817.

"were linked directly to the behavior which forms the basis for BHA's eviction action." It found that there was a genuine issue of material fact as to each issue which precluded entry of summary judgment in the defendant's favor. In short, *Roe* does not stand for the proposition for which it is cited.

Finally, the Charging Party cannot prevail on this claim of failure to make reasonable accommodation because not only did Ms. Hymn not request an accommodation prior to the effectuation of her eviction, she informed Respondents that she was desirous of moving. In a letter to management in response to the notice of eviction, Ms. Hymn offered to voluntarily terminate her lease, saying that it was "unlivable" at Courthouse Square and that she felt ". . termination [of the lease] is best for everyone." Cx-34 p. 8. She did not notify Respondents of any change in her position at any time prior to moving from Courthouse Square Apts.

Accordingly, I find that the Charging Party has failed to establish that Respondents refused to accommodate Ms. Hymn's handicap in violation of 42 U. S. C. § 3604(f).

III. Alleged violation of §3617

The Charging Party and Intervenor assert that Respondents interfered with Ms. Hymn's exercise of her right under the FHAA to aid or encourage others in the exercise of their rights in violation of 42 U.S.C. § 3617. Ms. Hymn, they argue, had a right to aid Ms. Eberhardt in the exercise of her rights. Because she exercised that right, Respondents evicted her. Respondents argue, however, that although Ms. Hymn intervened on behalf of Ms. Eberhardt, she was not aiding her in the exercise of a right accorded under the FHAA and that, in any event, her eviction had nothing to do with the fact that she aided Barbara Eberhardt.

Section 3617 provides as follows:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.

42 U. S. C. § 3617. To prevail on her claim under this provision, the Charging Party must show that (1) she is a protected person under the FHAA, (2) that she was engaged in the exercise or enjoyment of her fair housing rights, or was aiding or encouraging another in

the exercise of her rights, (3) respondents were motivated in part by an intent to discriminate, and (4) respondents coerced, threatened, intimidated, or interfered with the

plaintiff on account of her protected activity under the FHAA. *Grubbs*, 2 FH - FL (Aspen), ¶16,190 at 16,190.19. *See also People Helpers Foundation v. City of Richmond*, 789 F. Supp. 7225, 732 (E. D. Va. 1992); *Oxford House-C* v. *City of St. Louis*, 843 F. Supp. 1556, 1583 (E. D. Mo. 1994) *rev'd on other grounds*, 77 F. 3d 249 (8th Cir. 1996), *cert. denied*, __U. S.__, 136 L. Ed. 2d 27 (1996); and *United States* v. *Sea Winds of Marco, Inc*. 893 F. Supp. 1051, 1055 (M. D. Fla. 1995). *Johnson v. Smith*, 810 F. Supp 235 -239 (N. D. Ill. 1992).

Ms. Hymn has established that she is a protected individual under the FHAA because she was regarded as being handicapped by Respondents who provided her housing. *See* discussion, Part I.

Both Ms. Eberhardt and Ms. Hymn exercised fair housing rights by taking up residence in housing specifically designated for a protected group, i.e., for the disabled. *See Grubbs at 16,190.10*; *Johnson v. Smith*, 810 F. Supp. 235, 239 (N.D. Ill. 1992) a*nd Stackhouse v. DeSitter*, 620 F. Supp. 208, 211 (N.D. Ill. 1985). In *Grubbs*, the court found that Mr. Grubbs exercised his own fair housing rights merely by taking up residence in an Housing Authority of Joliet apartment. Following this rationale, I conclude that Ms. Eberhardt exercised her rights under the FHAA by taking up residence in Courthouse Square Apts., a residence for the disabled. It would follow that any challenge to a threat by Courthouse Square Apts. to her continued residency or to her continued enjoyment of her tenancy would be deemed an exercise of her rights under the FHAA. It also follows that anyone who aided her in her challenge would be aiding her in the exercise of her rights under the FHAA. Accordingly, I find that the Charging Party has met its burden of proof on elements one and two.

Further, it is clear from the evidence that Ms. Hymn thought that Ms. Eberhardt's fair housing rights were being violated. She accused Mrs. DeJongh of picking on Ms. Eberhardt because she was disabled, and told Mrs. DeJongh that what she was doing was "illegal." Cases that have dealt with retaliation in civil rights cases suggest that a person is protected if the person thinks that he is asserting a protected right. *See Love v. ReMax of America, Inc.* , 738 F. 2d 383 (10th Cir. 1984) ("the plaintiff does not have to prove that the conduct opposed was, in fact, a violation of Title VII. The activity is protected even when it is based on a mistaken good faith belief that Title VII has been violated.)" 738 F. 2d at 385. *See also Broome v. Biondi* 17 F. Supp. 2d. 211 (S. D. N.Y.). I conclude that the Charging Party has established that Ms. Hymn was aiding or encouraging Ms. Eberhardt in

the exercise of fair housing rights.

However, the Charging Party has failed to establish elements three and four of its *prima facie* case: that Respondents interfered with her tenancy on account of her intervention in the matter of Barbara Eberhardt and that Respondents were motivated by an intent to discriminate against her based on her handicap. In Parts I and II, I have rejected the Charging Party claim of intentional discrimination based on handicap. I concluded that Respondents evicted Ms. Hymn not because she interfered in the matter involving Barbara Eberhardt, but because of the *manner* in which she intervened, i.e., because of the hostile, angry, and verbally abusive way she spoke to Joan DeJongh. In this regard, it has been held that: "[w]hen the conduct that allegedly violated § 3617 is the same conduct that allegedly violated § 3604(a),[20] and was engaged in by the same party, the validity of the § 3617 claim depends upon whether the [conduct] violated § 3604(a)." *See Grubbs v. Housing Authority of Joliet*, 16,190.19 *citing South Suburban Housing Center v. Greater So. Suburban Board of Realtors*, 935 F. 2d 868, 886 (7th Cir. 1991) *cert. denied sub nom, Greater South Suburban Board of Realtors v. City of Blue Island*, 502 U. S. 1074 (1992) *quoting Arlington Heights*, 558 F. 2d at 1288 n. 5. *See also Cavalieri - Conway v. Butterman*,
2 FH -FL (Aspen) ¶ 16,257 (1998) (plaintiff failed to establish violation of § 3617 where defendant's conduct not shown to violate the Act.)

Following these cases, I find that the Charging Party has failed to establish discrimination in violation of section 3617.

ORDER

The Charging Party has failed to prove by a preponderance of the evidence that Respondents engaged in the discriminatory housing practices alleged in the Charge of Discrimination. Accordingly, this matter is hereby ORDERED *Dismissed*.

This Order is entered pursuant to 42 U. S. C. § 3612(g)(3) and 24 C.F.R. § 104.910, and it will become final upon the expiration of 30 days or the affirmance in

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[20]The relevant language in § 3604(f) is identical to that in § 3604(a) , therefore, the same test is applicable.

whole, or in part, by the Secretary of HUD within that time.

_____
CONSTANCE T. O'BRYANT
Administrative Law Judge

So **ORDERED** this 13th day August, 2001.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 08-95-0321-8, were sent to the following parties on this 13th day of August 2001, in the manner indicated:

_____
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